NURINAH ALIP & ANOR v. EDWIND ES BANTING & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
AMELATI PARNELL JC
[CIVIL APPEAL NO: BKI-12B-3-11-2020]
4 OCTOBER 2021

Abstract – *Sogit kampung and sogit mangsa, as an adat of the Kadazandusun of Penampang, are meant to appease the family of the victims in a misadventure or misfortune, and its parameters must remain finite as such and not be unnecessarily extended or magnified. It follows that for the appellants pedestrians herein, the fact that they have accepted and retained sogit kampung monies from the respondents after being hit by a vehicle driven by the first respondent and owned by the second respondent, were not restrained by law from filing an action claiming for damages against the latter. Conversely, for the respondents, payment of such monies cannot amount to 'accord and satisfaction' and cannot by itself discharge them from further liability.*

ROAD TRAFFIC: *Accident – Claim – Liability – Appeal against decision of Sessions Court Judge – Driver lost control of vehicle and ran onto pedestrians standing at roadside – Victims accepted 'sogit kampung' and 'sogit mangsa' – Adat or customary of Kadazandusun of Penampang – Whether intention of all parties that accident to be settled amicably between parties through payments of 'sogit' – Whether initial cash payments for medical expenses/treatments received and retained by victims showed intentions and agreements to discharge driver from further liability – Whether victims estopped from pursuing legal action*

This was the first and second appellants' ('appellants') appeal from the decision of the Sessions Court Judge ('SCJ') in dismissing their claim against the first and second respondents ('respondents'). The appellants' claim against the respondents was for damages arising out of a road accident. The appellants were at all material times pedestrians standing at the roadside whereas the first respondent was the driver of a vehicle Perodua Viva belonging to the second respondent. Due to a collision, the appellants suffered from injuries. The SCJ dismissed the appellants' claim on the grounds, *inter alia*, the SCJ's finding that 'it has always been the intention of all parties that the accidents happened in this case is to be settled amicably between parties through payments of '*sogit*' and initial cash payments for medical expenses/treatments have been received and retained by the plaintiffs'. By applying *Kerpa Singh v. Bariam Singh*, the SCJ was satisfied that the fact that the appellants accepted and retained the money paid showed their intentions and agreements to discharge the respondents from further liability. In this appeal, it was the appellants' contention that, *inter alia*, the

SCJ had misinterpreted the principles in *Kerpa Singh v. Bariam Singh* and failed to appreciate the evidence adduced before her when considering whether the respondents have successfully proved the defence of accord and satisfaction. The respondents raised preliminary objection that the issue of 'accord and satisfaction' did not form any of the grounds in this appeal and was never pleaded anywhere in the memorandum of appeal.

Held (allowing appeal):

(1) The preliminary objection was devoid of merits. The appellants had indeed addressed the issue before the trial judge in submitting that the Surat Perjanjian Damai ('perjanjian') was void for uncertainty and hence, there was no agreement as to settlement. The said perjanjian was contended initially to not be in compliance with s. 10(1) of the Contracts Act 1950. Eventually, the issue of accord and satisfaction was raised. The court failed to see how these arguments differed and how the appellants could be said to have been inconsistent. Despite it not being conspicuously indicated, the doctrine fell in the line of deliberation of the SCJ especially when reference was made to the case of *Kerpa Singh v. Bariam Singh*. The preliminary objection was dismissed. The court proceeded to consider the appeal proper. (paras 23-25 & 28-29)

(2) The appellants did not make demands to pursue the purported outstanding due under the 'perjanjian' as the appellants had accepted the repudiation of the compromise on the part of the first respondent and re-assert their original claim against the first respondent *ie*, to pursue civil claim against the respondents for damages arising out from the road accident. Should the appellants make any demands in respect of the outstanding amount under the 'perjanjian', they would in effect be estopped from pursuing the present suit by way of election as they have chosen to affirm the compromise and sue upon it. Further to the payment of RM4,000 paid to each appellant, the perjanjian had also stipulated for payments of '*sogit kampung*' and '*sogit mangsa*'. While the payment of '*sogit*' is a matter of adat or customary of the Kadazandusun of Penampang, '… it is the usual practice to specify medical costs and expenses as additional payments to accompany the *sogit*. This is just a common observance and entirely contractual. This is not Adat'. (paras 58, 59 & 62)

(3) The SCJ misapplied the principles in *Kerpa Singh v. Bariam Singh*. This was not the scenario where no evidence was tendered that the payments were intended or at all to be full and final settlement of the appellants' claim against the respondents. The first respondent was aware and testified that he had to pay the sums stated in the letters from the appellants. The finding made by the SCJ was against all the evidence of the witnesses, in particular the testimony of the first respondent when

he gave evidence that there was outstanding balance due to the appellants and the perjanjian had not been fully settled and completed. (paras 67 & 68)

(4) Taking a legal action could not be said to be a breach of peace and harmony or breach of adat because the appellants and the first respondent knew from the outset that payment of *sogit* and payment of compensation were two distinct matters. Hence, the finding by the SCJ that the appellants were estopped from putting another claim against the defendants through the present suit as the payments of *sogit* and initial case payments for medical expenses/treatments have been received and retained by the appellants, lacked sufficient judicial appreciation of the evidence adduced in respect of the perjanjian. (paras 71 & 72)

(5) The parties to the perjanjian were well aware that the payment of *sogit kampung* and *sogit mangsa* were meant to appease the family of the victims. Nowhere in the respondents' evidence that the respondents had been induced that the *sogit* payments and the initial cash payments of RM4,000 paid to each appellant was meant to be in satisfaction of the appellants' claim against the respondents. (para 96)

(6) Having admitted to losing control of the Perodua Viva and running onto the appellants who were pedestrians standing at the roadside at the material time, 100% liability ought to be pronounced on the first respondent. The first respondent was solely liable for the occurrence of the accident. The second respondent being the registered owner of the Perodua Viva was therefore vicariously liable. The appellants had therefore proved their claims against the respondents. (paras 91 & 100)

Case(s) referred to:

Balakrishnan Sinnappan & Satu Lagi lwn. Mariammah Ganapragasm & Yang Lain; Anthonysamy Atputham (Pihak Ketiga) [2006] 3 CLJ 334 HC ***(refd)***

Bank Pertanian Malaysia Bhd v. Nora'rifah Darus [2014] 7 CLJ 631 CA ***(refd)***

Kerpa Singh v. Bariam Singh [1965] 1 LNS 66 FC ***(refd)***

Mirra Sdn Bhd v. The Ayer Molek Rubber Company Bhd [2008] 3 CLJ 273 CA ***(refd)***

Misliha Lagiman v. Linguaphone Distributors Sdn Bhd [2003] 1 LNS 598 HC ***(refd)***

Mohammad Asra Affindi Salleh v. Suresh Perumal Shean Ah Sdn Bhd [2020] 1 LNS 1219 HC ***(dist)***

Mohd Tajuddin Salleh v. Mokhari Murgis & Anor [1993] 3 CLJ 42 HC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Suriyati Takril v. Mohan Govindasamy & Anor [2001] 2 CLJ 101 HC ***(refd)***

Teoh Weng You & Anor v. Tan Hee Joo [2017] 8 CLJ 477 HC ***(refd)***

United Overseas Bank (Malaysia) Bhd v. Bina Indah Bersekutu Sdn Bhd & Ors [2009] 1 LNS 1004 HC ***(refd)***

Wong Lai Fatt v. PP [1973] 1 LNS 175 FC ***(refd)***

Worldwide Laser Service Corp v. Excel Electronics & Industrial Suppliers Sdn Bhd [1998] 1 CLJ 1023 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 10(1)
Courts of Judicature Act 1964, ss. 27, 29
Evidence Act 1950, s. 114(g)
Road Traffic Rules 1959, r. 10
Rules of Court 2012, O. 55 r. 4(3)

Other source(s) referred to:
Malaysian Civil Procedure (2018 edn), vol 1, Sweet and Maxwell, para 55/4/4

For the 1st & 2nd appellants - Michael Denis Tan; M/s Michael Denis Tan & Co
For the 1st & 2nd respondents - Sa'adah A Aziz; M/s Lee & Aziz, Advocs

[Editor's note: Appeal from Sessions Court; Suit No: BKI-A53KJ-52/9-2019 (SC5).]

Reported by Lina E

JUDGMENT

Amelati Parnell JC:

Introduction

[1] This is the first and second appellants' appeal from the decision of the learned Sessions Court Judge ("SCJ") on 13 November 2020 in dismissing the first and second appellants' claim against the first and second respondents with costs.

[2] The cause of action here is for general and special damages arising from a road accident in which the first and second appellants, who were pedestrians on the road at the material times, were being knocked by the defendants' motor-vehicle Perodua Viva bearing registration no. SAB4378B.

[3] For the purpose of this appeal, the parties shall be referred as they were in the court below, interchangeably as appellants and respondents.

Salient Fact Of Case

[4] The first and second appellants' claim against the first and second respondents was for damages arising out of a road accident which occurred on 24 August 2018 at or around 4:30pm near or at Kampung Babagon, Jalan Sapulut-Donggongon, Tambunan ("the accident").

[5] The first and second appellants were at all material times the pedestrians standing at the roadside, whereas the first respondent was at all material times the driver of a vehicle Perodua Viva bearing Registration No. SAB4378B ("Perodua Viva") belonging to the second respondent.

[6] Due to this collision, the first and second appellants suffered injuries.

[7] The trial of this suit was held on 10 August 2020, 11 August 2020 and 18 August 2020 ("the trial") respectively. Seven witnesses (including the first and second appellants themselves) had been called to prove the appellants' claim whereas four witnesses had been called for the respondents' case.

[8] The agreed issues to the tried, as can be seen at p. 3 of decision and grounds of decision (supplementary record of appeal [encl. 2]) are as follows:

(1) Whether the accident involving the vehicle Perodua Viva bearing registration no. SAB4378B driven by the first defendant and the plaintiffs as pedestrians was wholly and solely caused by the negligence of the first defendant?

(2) Whether the severe personal injuries suffered/sustained by the plaintiffs were directly and/or solely caused and/or materially contributed by the first defendant's negligence?

(3) What were the nature and extent of the injuries suffered by the plaintiffs?

(4) Whether by virtue of the respective perjanjian penerimaan wang dated 19 December 2018, there has been an accord and satisfaction at law to discharge the defendants from all liability and obligations (if any proven in this trial) in having to meet the plaintiffs' claim in this action?

(5) Whether on account of both "*sogit kampung*" and "*sogit mangsa*" as provided in the surat perjanjian damai dated 13 December 2018, the defendants are deemed discharged from all liabilities and obligations in having to meet the plaintiffs' claims in this action?

(6) Whether by reason of the matters stated in paras. 4 and 5 herein, the plaintiffs are now estopped from taking up or proceeding with this action against the defendants.

[9] The claim of the first and second appellants was dismissed on the grounds, *inter alia*, the learned SCJ of the finding that "it has always been the intention of all parties that the accidents happened in this case is to be settled amicably between parties through payments of "*sogit*" and initial cash payments for medical expenses/treatments have been received and retained by the plaintiffs."

[10] The learned SCJ held that this fact can be considered as an agreement to discharge the respondents from any further liability. By applying the Federal Court decision in *Kerpa Singh v. Bariam Singh* [1965] 1 LNS 66 in the present suit, the learned SCJ was satisfied that the facts that the appellants in accepting and retaining the money paid show the intentions and agreements to discharge the respondents from any further liability.

First And Second Appellants' Contention

[11] The first and second appellants contend that, *inter alia*, the learned SCJ has misinterpreted the principles in *Kerpa Singh v. Bariam Singh* (*supra*) and also failed to appreciate the evidence adduced before her when considering whether the respondents (defendants) have successfully proved the defence of accord and satisfaction.

[12] In the memorandum of appeal [ROA, pp. 182 to 184], the grounds of the present appeal as relied by the first and second appellants are that:

(a) The learned judge erred in law and in fact in failing to hold that the first and second appellants had proved their case affirmatively.

(b) The learned judge erred in law and in fact in holding that it had always been the intention of all parties that the said accident was to be settled amicably through surat perjanjian damai dated 13 December 2018 (exh. P6), and thus had failed to understand fully the contents of the said document.

(c) The learned judge erred in law and in fact in failing to hold that the said surat perjanjian damai dated 13 December 2018 (exh. P6) only dealt with the payments of *sogit* and not full settlement of the first and second appellants' entitlement for damages.

(d) The learned judge erred in law and in fact in failing to draw an adverse inference against the first respondent, who had failed to call Abdullah bin Jimon (Dulah), the key person to the purported negotiation, to provide/direct his evidence pertaining to the purported amicable settlement.

(e) The learned judge erred in law and in fact in giving undue weight to the oral evidence of the first respondent, in particular, the purported amicable settlement *via* surat perjanjian damai dated 13 December 2018 (exh. P6) and other documents filed in the agreed bundle of documents, when the first respondent admitted that his obligations towards the first and second appellants had not yet been discharged in full.

(f) The learned judge erred in law and in fact in holding that the acceptance of payments of *sogit* and initial cash payments for medical expenses/treatments is considered as an agreement to discharge the respondents from any further liability.

(g) The learned judge failed to distinguish the case of *Kerpa Singh v. Bariam Singh* [1965] 1 LNS 66 in the present suit, and her decision in dismissing the claims of the first and second appellants is therefore erroneous.

(h) The learned judge erred in law and in fact in failing to give due weight to the evidence of the appellants' witnesses at the trial and therefore, the decision of the learned judge was against the weight of all the evidence.

(i) The learned judge erred in law and in fact in taking into account irrelevant considerations and in failing to give due weight to relevant considerations.

[13] It was therefore submitted that the main issues for determination by this court are that:

(i) Whether there had been any accord and satisfaction in the present case? A

(ii) If item (i) is in negative, whether the appellants had proved their claims against the respondents?

First And Second Respondents' Preliminary Objection

[14] The preliminary objection raised by learned counsel for the respondents is that the issue of "accord and satisfaction" did not form any of the grounds in this appeal and was never pleaded anywhere in the memorandum of appeal. B

[15] Order 55 r. 4(3) provides that the memorandum of appeal shall, "set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided". C

[16] It is to be noted that nowhere does it states that the term to be employed in drafting the memorandum of appeal must be specific aside from the points of law or fact which are alleged to have been wrongly decided. D

[17] The purpose of the memorandum of appeal, as illustrated in the case of *Worldwide Laser Service Corp v. Excel Electronics & Industrial Suppliers Sdn Bhd* [1998] 1 CLJ 1023 is threefold, namely, (i) to point out errors for future guidance of the subordinate court; (ii) to give notice to the respondents on the grounds of appeal so that the respondents comes prepared to deal with the argument raised; and (iii) to focus submissions to the mistakes. E

[18] In Zakaria, A (edn) (2018) *Malaysian Civil Procedure* (Vol. 1) Sweet and Maxwell at para. 55/4/4, it is stated that: F

> The memorandum should briefly set out the grounds of the appeal. So it should contain a cogent statement of the appellant's objections against the judgment or the law and the facts that the judge wrongly decided, without any argument or narrative.

Again, no express indication nor any tacit inference can be deduced to show that there is a need to employ the specific terms in preparing the memorandum of appeal. G

[19] In this instant appeal, learned counsel for the appellants submit that, although the specific wordings of "accord and satisfaction" were not expressed in the memorandum of appeal, the following grounds of memorandum of appeal portray such legal principles: H

> Ground (b) The learned judge erred in law and in fact in holding that it had always been the intention of all parties that the said accident was to be settled amicably through surat perjanjian damai dated 13 December 2018 (exh. P6), and thus had failed to understand fully the contents of the said document. (issue of accord) I

> Ground (e) The learned judge erred in law and in fact in giving undue weight to the oral evidence of the first respondent, in particular, the purported amicable settlement *via* surat perjanjian damai dated 13 December 2018 (exh. P6) and other documents filed in the agreed bundle of documents, when the first respondent admitted that his obligations towards the first and second appellants had not yet been discharged in full. (issue of satisfaction)

[20] With reference to these two grounds of appeal in the memorandum of appeal filed herein, the appellants are clearly pointing out the error allegedly made by the trial judge and providing sufficient notice to the respondents as to their main complaint that is the absence of accord and satisfaction. The focus of their submission is also pivoting on the aforementioned doctrine. Detailed perusal of these grounds would not suggest or imply any other defence.

[21] Learned counsel for the respondents further submit that the issue of whether there was "accord and satisfaction" between the parties with respect to the agreements was never addressed by the appellants in their submissions before the learned trial judge.

[22] As can be seen from the submission by learned counsel for respondents on the preliminary issue, the issue of 'accord and satisfaction' were address. It was submitted as follows:

> "The issue of "accord and satisfaction" is formulated as part of **Issue 4** of the Issues to Be Tried. In their Submissions before the Trial Judge - the respondents **had rephrased** this issue as follows:
>
> **Quote:**
>
> **"Issue 4**
>
> **The Defendants' will have Paragraph 4** - Enclosure 37 **to be restated and/ or rephrased/amended in the manner underlined in red ink below**:
>
> 4. Whether by virtue of ~~the~~ ~~Perjanjian Penerimaan Wang dated 5-19.12.2018~~ **Surat Perjanjian Damai (The Perjanjian Damai) dated 13.12.2018 - as the overall governing document; and**
>
> **(a) the Surat Akuan Penerimaan dated 29.11.2018 -**
>
> **- For Payment of *Sogit Kampung* and *Sogit Mangsa* Kemalangan; and**
>
> **(b) the 2 (two) Perjanjian Penerimaan Wang dated 19.12.2018**
>
> **- For Costs of Medical Treatment and other claims as documents in support of and attesting to the terms and conditions of The Perjanjian Damai** - there has been accord and satisfaction at law to discharge the Defendants from all liability and obligations (if proven in the trial) in having to meet the Plaintiffs' claims in this action;
>
> (emphasis added)

[23] In my judgment, the preliminary objection raised are devoid of merits. Learned counsel for appellants had indeed address the issue before the trial judge in submitting that the surat perjanjian damai dated 13 December 2018 (exh. P6) is void for uncertainty and hence there is no agreement as to settlement. (see pp. 289 to 292, ROA).

[24] The said perjanjian was contended initially to not be in compliance with s. 10(1) of the Contracts Act 1950. Eventually the issue of accord and satisfaction was raised. Nonetheless, I failed to see how these arguments differ and how the appellants could be said to have been inconsistent. The said perjanjian was contended to be an invalid contract as it was not made out of consensus *ad idem*. There has never been any accord or agreement by parties that with the said perjanjian, the appellants will now abandon its claim against the respondents. There is also no satisfaction to the said perjanjian as the respondents never completed their obligations under the said perjanjian. The payment was never fully satisfied. As such, the appellants' position has always been constant.

[25] I also have had the liberty of perusing the grounds of decision of the learned SCJ and it is my finding that despite not conspicuously indicated, the aforementioned doctrine also fell in the line of deliberation of the learned SCJ especially when reference was made to the case of *Kerpa Singh v. Bariam Singh* [1965] 1 LNS 66; [1966] 1 MLJ 38 that discussed the said doctrine.

[26] As for the case of *Mohammad Asra Affindi Salleh v. Suresh Perumal Shean Ah Sdn Bhd* [2020] 1 LNS 1219; [2020] MLJU 1400 which was referred by the respondents, I also find that its facts are distinguishable from our present appeal. In the former, the issue of pleadings was never mentioned and could not even be inferred from the grounds of appeal in the memorandum of appeal. In this present appeal, the grounds are included but not expressed in the exact terms. Nonetheless, I find the notice provided is sufficient to disclose the appellants' complaints.

[27] I am also minded of my role as described by Ong CJ in *Wong Lai Fatt v. PP* [1973] 1 LNS 175; [1973] 2 MLJ 31 that is "the paramount function and duty of the courts is to see that justice is done in all cases." Thus, I cannot turn a blind eye and shy away from rectifying an erroneous order merely on lexical semantics.

[28] For the reasons stated, the preliminary objection is hereby dismissed.

[29] I shall now proceed to consider the appeal proper.

Principles Of Appellate Intervention

[30] Section 29 of the Courts of Judicature Act 1964 (Act 91) provides that the appeal is heard at the High Court by way of re-hearing. Therefore, the evidence adduced during the trial at the Sessions Court, findings,

observations made and conclusions arrived by the learned Sessions Court Judge (SCJ) is subject to scrutiny by this court in its exercise of appellate jurisdiction pursuant to s. 27 of Act 91.

[31] It is therefore the duty of this court being an appellate court, to be judge of fact as well as law – See *Balakrishnan Sinnappan & Satu Lagi lwn. Mariammah Ganapragasm & Yang Lain; Anthonysamy Atputham (Pihak Ketiga)* [2006] 3 CLJ 334; [2006] MLJU 193.

[32] In *Bank Pertanian Malaysia Bhd v. Nora'rifah Darus* [2014] 7 CLJ 631 (CA), it was stated that:

> At the outset we must say that the jurisdiction of the appellate court to intervene with the finding of facts by a trial judge is well defined in *catena* of decisions by our courts. It has been settled that an appellate court can intervene with the finding of facts when the findings are grounded entirely on speculations, surmises or conjectures; when an inference made by a trial court from its factual findings is plainly wrong, absurd or illogical; where there is none or insufficient judicial appreciation of evidence; when the findings of a trial judge run contrary to the admission of the parties to the case, or fail to notice certain relevant facts which if properly considered, will justify a different conclusion; when the findings of fact are premised on the absence of evidence, or are contradicted by the evidence on record ...

[33] In the more recent case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, after having looked at the various cases relating to the extent of intervention of an appellate court, the Federal Court concluded that an appellate court should not interfere with factual findings of a trial judge unless it was satisfied that the decision of the trial judge was plainly wrong or one that no reasonable judge could have reached. If it is not, the fact that the appellate court may have reached a different conclusion on the facts, is irrelevant.

Evaluation & Findings Of This Court

(i) Whether There Had Been Any Accord And Satisfaction In The Present Case?

[34] As mentioned above, the claim of the first and second appellants was dismissed on the grounds, *inter alia*, that the learned SCJ of the finding that the "plaintiffs' were estopped from putting another claim against the defendants through the present suit as the payments of *sogit* and initial cash payments for medical expenses/treatments have been received and retained by the plaintiffs." The learned SCJ held that this fact can be considered as an agreement to discharge the defendants from any further liability.

[35] During the trial surat perjanjian damai dated 13 December 2018 – exh. P6 ("perjanjian damai") were pleaded and referred to by the respondents to show that there were settlement by parties.

[36] The first and second appellants contend that, *inter alia*, the learned SCJ has misinterpreted the principles in *Kerpa Singh v. Bariam Singh* (*supra*) and also failed to appreciate the evidence adduced before her when considering whether the respondents (defendants) have successfully proved the defence of accord and satisfaction.

[37] The issue for determination is whether the perjanjian damai for the payments of *sogit* and medical treatment costs amounts to accord and satisfaction and estoppel against the suit filed by the first and second appellants.

[38] The respondents on the other hand submit the reasons given by the learned SCJ as the basis for her decision to dismiss the appellants' claims were crystal clear and were supported by both the oral and documentary evidence produced in the trial. There was therefore no error whatsoever on the part of the learned SCJ in holding the appellants had failed to prove their case.

[39] The respondents further submit that "accord and satisfaction" had not constituted a finding of the learned SCJ. Instead, the learned SCJ had simply found:

(i) There were three documents executed by the parties:

The surat perjanjian damai dated 13 December 2018 (exh. P6); the perjanjian penerimaan wang dated 19 December 2018 (exhs. P7 and P17); and surat tuntutan perbelanjaan di hospital (exhs. P12 and P16). It was found the above documents had been signed by the appellants and acknowledged by the first respondent that partial payments have been made.

(ii) From these documents and from the testimonies of witnesses the trial judge had further found: Quote: "... it was always the intention of the parties that the accidents happened in this case is to be settled amicably between the parties through the said agreements."

(iii) As there is now an agreement between the parties to settle the accidents amicably the appellants are estopped from putting up another claim against the respondents through this action.

[40] Upon careful reading of the grounds of decision of the learned SCJ, it is clear that by applying the principle in the case of *Kerpa Singh v. Bariam Singh* (*supra*), the learned SCJ had in fact put her mind into considering the issue of "accord and satisfaction" in holding that the acceptance of payments of *sogit* and initial cash payments for medical expenses/treatments is considered as an agreement to discharge the respondents from any further liability.

[41] For ease of reference, the contents of the perjanjian damai is reproduced below: [Refer ROA, pp. 189 to 190 surat perjanjian damai]

A

SURAT PERJANJIAN DAMAI

B

SURAT PERJANJIAN DAMAI INI diperbuat pada 13/12/2018 diantara PIHAK FERTAMA, PIHAK KEDUA dan PIHAK KETIGA (seperti ternyata dibawah).

C

EDWIND E S BANTING @ EDDIE BIN MOHD BANTING, K/P BIL: 660112-12-5005 , beralamat Kg. Karanaan, Tambunan sebagai **PIHAK PERTAMA**, dan

D

MARY BT GIKIL, K/P BIL: 730201-12-5382 , beralamat Kg. Babagon, Penampang sebagai **PIHAK KEDUA**, dan

NURINAH BT ALIP, K/P BIL: 740703-12-5648, beralamat Kg. Babagon, Penampang sebagai **PIHAK KETIGA**.

E

SEHUBUNGAN dengan kejadian kemalangan jalanraya pada hari Isnin, 24 September 2018, sekitar jam 4.20 petang di Kampung Babagon, Penampang.

F

Akibat kejadian kemalangan tersebut, Pihak Kedua dan Pihak Ketiga telah mengalami kecederaan.

G

Atas kejadian kemalangan tersebut, kami Pihak Pertama, Pihak Kedua dan Pihak Ketiga mengambil keputusan sepakat berdamai untuk menyelesaikan kes kemalangan ini secara kekeluargaan tanpa paksaan dari mana-mana pihak pun.

H

I

DENGAN perjanjian sebagai berikut:

PIHAK PERTAMA mengakui akibat kecuaian semasa memandu kereta SAB 4378 B sehingga mengakibatkan kecederaan PIHAK KEDUA dan PIHAK KETIGA.

PIHAK PERTAMA telah membayar Sogit Kampung dan Sogit Mangsa berjumlah RM1,275.00 pada 29 November 2018 kepada PIHAK KEDUA dan PIHAK KETIGA.

PIHAK PERTAMA dengan ini bersedia membantu biyaya kos perubatan kepada PIHAK KEDUA dan PIHAK KETIGA.

PADA MASA MENYAKSIKAN HAL HAL DI ATAS Kami, PIHAK PERTAMA, PIHAK KEDUA DAN PPIHAK KETIGA yang tersebut dalam perjanjianini telah menurunkan di sini tandatangan pada haribulan dan tahun yang tersebut diatas.

(EDWIND E S BANTING @EDDIE BIN MOHD BANTING)

(MARY BT GIKIL)
13/12/2018

(NURINAH BT ALIP)
13/12/2018

(SAKSI)
Giki o Solidon
461206-12-5037

(SAKSI)
Henry Jones @ Hassan Daniel Jonu
710604-12-5463

[42] At para. 7, first page of the perjanjian damai [ROA: p. 189] stated that "Atas kejadian kemalangan tersebut, kami pihak pertama, pihak kedua dan pihak ketiga mengambil keputusan sepakat berdamai untuk menyelesaikan kes kemalangan ini secara kekeluargaan tanpa paksaan dari mana-mana pihak pun."

[to jointly and severally decide – to settle peacefully and in family camaraderie and without duress from any factions/parties – the case arising from the collision involving the plaintiffs and defendants (see amended statement of defence – ROA p. 14)]

[43] The second page of the perjanjian damai [ROA: p. 190], the first and second appellants agree to accept from the first respondent the sum of RM1,275 cash for '*sogit kampung* and *sogit mangsa*' on 29 November 2018 *ie*, prior to the date of the perjanjian damai dated 13 December 2018. And that the first respondent (pihak pertama) would pay the medical costs to the first appellant (Nuriah binti Alip) and second appellant (Mary binti Gikil).

[44] It is not disputed that no specific amount in respect of the medical costs was stated in the perjanjian damai.

[45] To assess whether the defence of accord and satisfaction is available to the respondents (defendants), the appellants rely on the detailed explanation given in the case of *Misliha Lagiman v. Linguaphone Distributors Sdn Bhd* [2003] 1 LNS 598, whereby Syed Ahmad Helmy B Syed Ahmad J stated that:

> The approach a court should take in determining whether there has been 'accord and satisfaction', both in law and fact, is well settled and the best exposition of it appears in Roskill J.'s judgment in *Margaronis Navigation Agency Ltd v. Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 at p. 319
>
> > Where the question arises whether a particular obligation has been performed, *the first thing that has to be done is to ascertain the nature of the obligation. That depends upon the construction of the contract and the construction of the contract is, of course, a question of law*. But that is only one part of the equation. *Having ascertained what the obligation is, one then has to measure the performance, and see whether the performance fulfils the obligation*. That again ultimately is either a question of law or a question of mixed facts and law; not perhaps in every case, but in a great many cases.'
>
> The importance of ascertaining the exact terms of the compromise or "obligation", as Roskill J puts it, is that *it determines the question of whether or not the plaintiff can rely on his original cause of action. If, for instance, the promised or actual forbearance to pursue the claim is construed as being in return for the promised performance of some act by the other, or whom I would call the offending party, the agreement will be regarded as one involving the immediate discharge of the claim. But if the promised or actual forbearance is construed as being in return for the actual performance of some act by the offending party, the claim forborne will not be discharged until such performance takes place* (see, the *British Russian Gazette*'s case, *supra*), *and if in this respect the offending party fails to perform the terms of the compromise, the other party has an option to either accept the offending party's repudiation of the compromise and re-assert his original claim or affirm the compromise and sue upon it*.
>
> (emphasis added)

[46] His Lordship went on and explained the terms of "compromise" and "evidence of accord" by citing *Chitty on Contracts – General Principles* (27th edn):

On compromise, *Chitty on Contracts – General Principles* (27th edn) states at para 22-012:

> In order to establish a valid compromise, it must be shown that there has been agreement (accord) which is **complete** and **certain in its terms, and that the consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim**.
>
> (emphasis added)

And at para. 22-019, on evidence of accord:

> **The question whether there has been an accord and satisfaction is a question of fact**. Thus, retention and use by a creditor of a cheque sent by a debtor in full and final satisfaction of a larger claim does not as a matter of law, constitute an accord and satisfaction. The intention of the creditor in cashing the cheque must be objectively ascertained. Cashing a cheque or retention of a cheque without rejection is strong evidence of assent by the creditor but it is not conclusive evidence so that a creditor who, at the moment of paying in the cheque, makes clear that he is not assenting to the conditions imposed by the debtor will not be held to have entered into an accord and satisfaction. The construction of any correspondence which, it is alleged, evidences the accord is, however, a question of law.
>
> (emphasis added)

[47] Having perused the above authorities, His Lordship Syed Ahmad Helmy B Syed Ahmad J summarised his observation in seven principles:

(i) the defence of 'accord and satisfaction' **may be held to extinguish** a cause of action of a litigant;

(ii) **it is for the defendant to prove** that there is indeed 'accord and satisfaction';

(iii) the operation of 'accord and satisfaction' is nothing more than the ordinary application of the law of contract;

(iv) the **accord is the agreement by which the obligation is discharged**;

(v) it **must be shown that the agreement is complete and certain in its terms**;

(vi) the question whether there has been an accord **is a question of fact**;

(vii) the question of construction of correspondence, which, it is alleged, evidences accord, is a question of law.

(emphasis added)

[48] In the present case, apart from the perjanjian damai, there were two letters (undated), exhs. P12 and P16 (see ROA, pp. 215 to 216) which had been duly signed by the respective appellants and the first respondent.

(i) in respect of the letter [see ROA, p. 215] from the first appellant to the first respondent, the first appellant demanded the first respondent to pay a sum of RM5,102 being compensation in relation to the accident occurred on 24 August 2018 at Kg Babagon, Penampang; and

(ii) In respect of the letter [please see ROA, p. 216] from the second appellant to the first respondent, the second appellant demanded the first respondent to pay a sum of RM9,734 being compensation in relation to the accident occurred on 24 August 2018 at Kg Babagon, Penampang.

[49] The appellants further submit that these letters are of similar nature to the letter in *Misliha Lagiman*'s (*supra*) where, the plaintiff through her solicitors issued a letter to the defendant, requesting for issuance of a corrective notice in respect of its notice dated 14 September 2001 to its customers that the plaintiff was no longer authorised to collect any payment on its behalf with effective from 1 September 2001. It was held that the plaintiff's claim was dismissed as the defendant had issued the said corrective notice on 30 October 2001 to correct the said date of 1 September 2001 to 14 September 2001 in accordance with the terms of the letter from the plaintiff's solicitor.

[50] In the present case, both the appellants testified that they signed on the said perjanjian penerimaan wang [exhs. P7 and P17] when they received payments from the first respondent [see ROA, p. 46, lines 6 to 13 of NOP; p. 62, lines 2 - 9 of NOP].

[51] The respective perjanjian penerimaan wang are reproduced as follows:

PERJANJIAN PENERIMAAN WANG

SAYA **NURINAH BTE ALIP** K/P Bil: 740703 – 12 – 5688 dengan ini mengesahkan telah menerima wang berjumlah **RM3,000.00** sebagai pendahuluan pembayaran tuntutan yang saya kemukakan. Tuntutan saya berjumlah RM5,012.00.

SAYA juga bersetuju bahawa baki tuntutan berjumlah **RM2,012.00** akan dibayar secara ansuran seperti berikut:

Pertama : RM1,102.00

Kedua : RM1,000.00 23/3/2019

PERJANJIAN ini ditandatangani pada 19.12.2018

(NURINAH BTE ALIP)

740703-12-5648

( ) K/P Bil 860319-49-5341

Saksi ABDUL HAFIZ BIN DAUD JUNUS

( ) K/P Bil 750201125382

Saksi MARY ASIATI GIKIL

A

PERJANJIAN PENERIMAAN WANG

SAYA **MARY BINTI GIKIL** K/P Bil: 730201-12-5382 dengan ini mengesahkan telah menerima wang berjumlah **RM3,000.00** sebagai pendahuluan pembayaran tuntutan yang saya kemukakan. Tuntutan saya berjumlah RM9,734.00

B

SAYA juga bersetuju bahawa baki tuntutan berjumlah **RM6,734.00** akan dibayar secara ansuran seperti berikut:

Pertama	:	RM1,734.00
Kedua	:	RM1,000.00 23/03/19
Ketiga	:	RM1,000.00
Keempat	:	RM1,000.00
Kelima	:	RM1,000.00
Keenam	:	RM1,000.00

C

D

PERJANJIAN ini ditandatangani pada 19-12-2018

E

(MARY BINTI GIKIL)

730201-12-5382

F

( ) ( )

K/P BIL 660319-49-5341 K/P BIL 010512-12-0989

SAKSI ABDUL HADI BIN DAVID JUNUS SAKSI IAN FERNANDO

G

[52] The appellants have argued that:

(i) It is noted that the total sums stated in the said perjanjian penerimaan wang [exhs. P7 and P17] are the same as stated in their letters to the first respondent [exhs. P12 and P16]. H

(ii) The effect of the appellants' letters to the first respondent is, if and only if the respondents had settled the aforesaid sums as demanded by the appellants prior to the commencement of the present suit, it would be tantamount to a satisfaction of the appellants' claim by the respondents which in effect extinguish the appellants' cause of action against the respondents. The doctrine of estoppel. I

(iii) It ought to be borne in mind that based on the said perjanjian penerimaan wang, the respective sums stated therein had not been settled in full prior to commencement of the present suit.

[53] The respondents submit the appellants are now making a further attempt at raising issues of part payment that were not pleaded in their statement of reply. It was submitted that there is no evidence led on this at the trial as the issue of part payments had not been pleaded by them.

[54] In reply to this, learned counsel for the appellant made reference to the case of *Misliha Lagiman v. Linguaphone Distributors Sdn Bhd* (*supra*) which stated that "... if in this respect the offending party fails to perform the terms of the compromise, the other party has an option to either accept the offending party's repudiation of the compromise and re-assert his original claim or affirm the compromise and sue upon it."

[55] Let us look at the respondents' amended defence on this 'part payment' issue:

> 20. The defendants will therefore contend upon:
>
> (a) the first Plaintiff's acceptance of the cash payments of RM4,102.00 (Ringgit Malaysia Four Thousand One Hundred and Two) only;
>
> (b) the second Plaintiff's acceptance of the cash payments of RM5,734.00 (Ringgit Malaysia Five Thousand Seven Hundred Thirty-Four) only;
>
> and both executing the Surat Perjanjian Damai and the respective Perjanjian Penerimaan Wang in record thereof – there has been an accord and satisfaction and/or waiver of the Plaintiff's rights at law to discharge the defendants from all liability and/or obligation/s in having to meet the Plaintiffs' claims as per this action filed. That by reason of the same, the Plaintiffs are now estopped from taking up and/or proceeding with this action against the defendants.
>
> 21. Further and/or in the alternative – on account of both '*sogit*' paid to the Plaintiffs – by adat – the defendants are deemed discharged from all liabilities and obligations in having to meet the Plaintiff's claims as filed in this action.
>
> [see ROA page 16]

[56] The amended reply by the plaintiff are as follows:

> 12. Paragraphs 20 to 22 of the Amended Statement of Defence of the defendants are categorically denied as nothing in the said Surat Perjanjian Damai, Perjanjian Penerimaan Wang nor the Acknowledgment of Receipt of Money suggests that the first and second Plaintiffs have agreed to waive their right of action against the defendants for full amount of damages suffered as a result of the collision including those medical costs and expenses and the defendants are put to strict proof thereof. The first

and second Plaintiffs shall contend that the first defendant, based on his admission of negligence on his part, ought to be liable for the direct and natural consequences of his wrongful act causing the collision. The first and second Plaintiffs further contend that as a general rule for awarding damages, any part payments received in mitigation of the Plaintiffs' loss ought to be taken into account in reduction of the damages, but not as a bar to the Plaintiffs' right of action as provided under Civil Law Act 1956.

[see ROA page 20]

[57] The above reply speaks out loud of the appellants' stand that "... nothing in the said surat perjanjian damai, perjanjian penerimaan wang nor the acknowledgment of receipt of money suggests that the first and second plaintiffs have agreed to waive their right of action against the defendants for full amount of damages suffered ... any part payments received in mitigation of the plaintiffs' loss ought to be taken into account in reduction of the damages, but not as a bar to the plaintiffs' right of action as provided under Civil Law Act 1956."

[58] I am in agreement with the appellants' learned counsel that in the present case, the appellants did not make any demands to pursue the purported outstanding due under the surat perjanjian damai, as the appellants had accepted the repudiation of the compromise on part of the first respondent and re-assert their original claim against the first respondent, *ie*, to pursue civil claim against the respondents for damages arising out from the road accident. Should the appellants make any demands in respect of the outstanding due under the surat perjanjian damai, they would in effect be estopped from pursuing the present suit by way of election as they have chosen to affirm the compromise and sue upon it.

[59] Further to the payment of RM4,000 paid to each appellant as shown in exhs. P7 and P17, the perjanjian damai had also stipulated for payments of '*sogit kampung* and *sogit mangsa*'.

[60] Perusing the amended statement of defence at para. 16(c), it was pleaded "to record acknowledgment that the first defendant had on 29 November 2018 paid the sum of RM1,275 for the purchase of two pigs - as "*sogit kampung*" and "*sogit mangsa* kemalangan" (*sogit* amount) to the plaintiffs. This was said to be the customary practice of the Dusun/Kadazan indigenous peoples originating from the District of Penampang, Sabah (see: ROA pp. 14 to 15).

[61] What then the effect of payments of "*sogit kampung* and *sogit mangsa*"? To this, reference is made to the evidence of the DW2, Datuk William Majimbon, the former District Chief of the Native Court of Kota Kinabalu:

Quote:

In the Adat of the Kadazandusuns of Penampang there is this common practice and wide observance by this ethnic group of the:

Pibabasan - means to make peace between two or more persons; and

Sogit - penance; fine; penalty, satisfaction and making amends – – the peace offering following and at completion of the peacemaking process. This will involve the slaughtering of animals – usually pigs – to restore and appease the spirits of the Kampung after blood has been spilled. *Sogit* is a haematic penalty. It is also a reconciliation and restorative event. If you now say it is not valid – you will be offending the spirits. **The Surat Perjanjian Damai signed by the two Plaintiffs with the first defendant is proof of the completion of the peacemaking process of *Pibabasan* and *sogit*.**

The effect:

Accordingly and by reason of all the above – the Parties here may not make any more claims against the other or here I would say the Plaintiffs are estopped from making any more claims against the defendants

I will further state Estoppel is a bar or an impediment preventing a Party from asserting a fact or claim that is inconsistent with a position that the Party has previously taken either by conduct or words – especially where the representation has been relied on or acted upon by the other Party. It is an unspoken consensus amongst the kampung dwellers – that there is now a forgiveness of all past sins and intrusions and peace between them as the spirits have been appeased. It is taboo to raise the matter – as no one should now so much as even to talk or speak about the incident.

(emphasis added)

[62] It is observed that while the payment of '*sogit*' as testified by DW2 is a matter of adat or customary of the Kadazandusun of Penampang, it was also the testimonies of DW2 in his witness statement that "... it is the usual practice to specify medical costs and expenses as additional payments to accompany the *sogit*. This is just a common observance and is entirely contractual. This is not adat." [See Q&A 7, DWS-2].

[63] Mary Lim Thiam Suan JC (as Her Ladyship then was) in *United Overseas Bank (Malaysia) Bhd v. Bina Indah Bersekutu Sdn Bhd & Ors* [2009] 1 LNS 1004; [2009] MLJU 0952 stated that:

The matter of whether there is accord and satisfaction is one determined from the facts. See *Kerpa Singh v. Bariam Singh* [1965] 1 LNS 66 and *Mirra Sdn Bhd v. The Ayer Molek Rubber Company Bhd* [2008] 3 CLJ 273. For there

to be accord, **there must be a consensus *ad idem***, or **there must be an inducement of one party to think there will be satisfaction of a claim** causing that person to thereby rely and act upon that inducement.

(emphasis added)

[64] From the facts and evidence adduced in the present case, it is clear that the payment of *sogit* in the sum of RM1,275 was made much earlier on 29 November 2018 *ie*, prior to the date of the perjanjian damai dated 13 December 2018 as the adat of the Kadazandusun of Penampang.

[65] The fact also shows that there is balance still due of the medical costs and expenses as additional payments to accompany the *sogit*. This are evident from the perjanjian penerimaan wang dated 19 December 2018 (exhs. P7 and P17).

[66] Further, there is no evidence before the court to show that the said sum of RM4,000 being paid to each appellant was intended to be the payment in full and final of the appellants' claim against the respondents. This is especially so when the first respondent testified during the trial and stated that there were outstanding balances due and owing and the said agreement (surat perjanjian damai (exh. P6)) had not been completed.

Q: Dalam pengetahuan kamu, adakah perjanjian ini sudah selesai

A: Memang belum sebab ada tunggakan yang saya belum bayar tapi saya pasti akan selesaikan tetapi memandangkan sekarang saya sudah tidak ada pendapatan tapi saya akan cuba untuk membayar. Saya akan bayar berapa dia punya balance

Q: Dalam perjanjian ini Plaintif-plaintif tiada bersetuju untuk melepaskan hak-hak menuntut dari segi undang-undang sivil

A: Ya

Q. Setuju – *sogit* dan kos perubatan adalah dua perkara

A. Setuju

Q: Walaupun *sogit* telah dijelaskan, memandangkan pembayaran kos perubatan belum dijelaskan, ini bermaksud penyelesaian-penyelesaian antara kamu dan Plaintif-plaintif belum disempurnakan

A: Ya, setuju.

[See ROA, Pages 97-98 of ROA]

[67] I am with the appellants that that the learned SCJ misapplied the principles in *Kerpa Singh v. Bariam Singh* (*supra*) where in this case the debtor's son had clearly stated in the letter that the payment of $4,000 was intended to be the payment in full and final settlement of the suit amounting

to $8,650. It was further stated that by receiving the said $4,000, the creditor would agree to discharge the debtor from any further liability and if the creditor did not agree the said settlement, the payment of $4,000 ought to be returned.

[68] This is not the scenario in the present appeal where, as stated above no evidence tendered that the aforesaid payments were intended or at all to be full and final settlement of the appellants' claim against the respondents. The first respondent was aware and testified that that he had to pay the sums as stated in the letters from the first and second appellants. The finding made by the learned SCJ is against all the evidence of the witnesses, in particular, the testimony of the first respondent when he gave evidence that there was outstanding balance due to the appellants and the surat perjanjian damai had not been fully settled and completed.

[69] The Court of Appeal in *Mirra Sdn Bhd v. The Ayer Molek Rubber Company Bhd* [2008] 3 CLJ 273 at p. 287 held that:

> [23] *As the respondent had failed to fulfil the substituted obligation to pay on the conditions as stipulated in the agreement between the parties, the appellant has every right to institute this action against the respondent*. This contention of the respondent is therefore without merit.
>
> (emphasis added)

[70] The appellants and the first respondent, who are the parties to surat perjanjian damai, are well aware that the payment of *sogit kampung* and *sogit mangsa* were meant to appease the family of the victims. It is their customary practice that *sogit* must be offered when blood had been shed/spilled. It is not disputed that the performance of *sogit* had been completed, evidenced by exh. P36 (surat akuan penerimaan by the second plaintiff/appellant).

[71] Taking a legal action cannot be said to be a breach of peace and harmony or breach of adat, because both the appellants (PW4, PW5) and the first respondent (DW1) knew from the outset that payment of *sogit* and payment of compensation are two distinct matters. DW2 also stated in his witness statement that "... it is the usual practice to specify medical costs and expenses as additional payments to accompany the *sogit*. This is just a common observance and is entirely contractual. This is not adat."

[72] Hence the finding by the learned SCJ that the plaintiffs were estopped from putting another claim against the defendants through the present suit as the payments of *sogit* and initial cash payments for medical expenses/ treatments have been received and retained by the plaintiffs' lack of sufficient judicial appreciation of the evidence adduced in respect of the said perjanjian penerimaan wang (exhs. P7 and P17), thus amounting to a misdirection.

[73] On the non-calling of Abdullah bin Jimon by the respondents, it does not attract adverse inference under s. 114(g) of the Evidence Act 1950 as the parties are not disputing they had each signed the documents forming the perjanjian damai. The signing of the surat perjanjian damai by first appellant, second appellant and first respondent was witnessed by DW4.

[74] In any event the appellants and the first respondent, who are the parties to surat perjanjian damai, are well aware that the payment of *sogit kampung* and *sogit mangsa* were meant to appease the family of the victims. Nowhere in the respondents' evidence that the respondents had been induced that the *sogit* payments and the initial cash payments of RM4,000 paid to each appellant was meant to be in satisfaction of the appellants' claim against the respondents.

[75] Learned counsel for appellants had also distinguished this case with the Tawau case as relied by the respondents during the trial, which had been addressed in the plaintiffs' submission in reply in the trial court, which is now reproduced:

Quote

13. The defendants also cited Tawau Sessions Court Suit No. TWU-A53KJ-7/11-2018 (SC) whereby the learned Sessions Court Judge Tuan Awang Kerisnada dismissed the Plaintiff's claim when His Honour Tuan Awang Kerisnada upheld that the Statutory Declaration formed part of the agreement between the parties that the claim had been settled when the Plaintiff accepted RM20,000.00 from the first defendant in cash.

14. The terms stated in the said Statutory Declaration are, *inter alia*, as follows:

1. Saya HUMRAH BINTI ABDULLAH, No. Kad Pengenalan: SB 613540 sebagai ibu kandung kepada MOHAMMAD KAHARRUDIN BIN DARWIS No. Kad Pengenalan 920614-12-6663 mewakili keluarga saya, dengan ini mengaku dan bersetuju bahawa saya telah menerima wang tunai sebanyak RM20,000.00 (Ringgit Malaysia Dua Puluh Ribu Sahaja) daripada pihak CHONG THAU SHIN @ CHONG FUI KHIONG No. Kad Pengenalan: 590217-12-5545 sebagai penyelesaian atas kematian anak saya.
2. ...
3. Saya mewakili ahli keluarga saya, bersetuju untuk membuat satu laporan polis untuk menarik balik/membatalkan laporan polis yang telah dibuat berkenaan kemalangan MOHAMMAD KAHARRUDIN BIN DARWIS dan tidak akan membuat apa-apa tuntutan terhadap pihak CHONG THAU SHIN @ CHONG FUI KHIONG.

(For verification purpose: – Verification Code: 12-5920585-4038215-4637613, Enclosure No. 22)

[76] Indeed in the Tawau case, there is an express promised forbearance as recorded in the statutory declaration. There is also a payment of RM20,000 in exchange of the plaintiff's promise to forego any further claim against the defendant. However, there is no express promised forbearance in the present case.

[77] In this instant case, having careful perusal of the records of appeal and the submissions by learned counsel for the appellants and the respondents, I am of the considered opinion that this was a case in which appellate intervention was warranted. On the reasons above stated, my answer to issue (i) whether there had been any accord and satisfaction in the present case, is in negative.

[78] With that I moved on to issue (ii) whether the appellants had proved their claims against the respondents?

[79] To start with, for personal injury claim, the issue of liability must be first determined by the trial judge. Upon pronouncement of liability then the special and general damages be assessed based on the evidence in support of particulars on the injury/injuries sustained by the victim(s).

[80] Hence, the first grounds on the memorandum of appeal that the learned judge erred in law and in fact in failing to hold that the first and second appellants had proved their case affirmatively.

[81] Learned counsel for the appellants had submitted that the learned SCJ had not addressed issues (1) to (3) in her decision and grounds of decision. The claim of the first and second appellants (plaintiffs) was dismissed on the grounds, *inter alia*, that "it has always been the intention of all parties that the accidents happened in this case is to be settled amicably between parties through the said agreement."

[82] The omission on the part of the learned SCJ addressing issues (1) to (3) and make a clear finding or pronouncements on the issue of liability based on the evidence placed before it, justifies appellate interference.

[83] The appellants' case is that the said accident was wholly caused by the negligence of the first respondent in losing control of his Perodua Viva vehicle, encroaching into the opposite road and knocking into the first and second respondents who were standing on the roadside.

[84] It is in evidence that the first respondents had acknowledged having experienced a blackout ("mengalami serangan pitam") prior to the collision that had caused him to lose control of the Perodua Viva and running into the first and second appellants/plaintiffs. [see ROA p. 82]

[85] Nevertheless, the purported blackout was not recorded in his police report (exh. D1). There is no documentary evidence to support the first respondent's assertion. During cross-examination, he admitted that this assertion of fact is an afterthought. [see ROA p. 88]

[86] Hj Abdul Malik bin Hj Ishak J (as His Lordship then was) in *Mohd Tajuddin Salleh v. Mokhari Murgis & Anor* [1993] 3 CLJ 42, emphasised the importance of stating a relevant fact in making a police report and that such failure to do so is fatal to one's case.

[87] In the case of *Suriyati Takril v. Mohan Govindasamy & Anor* [2001] 2 CLJ 101, it was held by the learned High Court Judge at p. 102 that if there was an omission on the part of the first respondent to state a material fact in his police report, he should not add to his police report by way of oral testimony.

[88] In fact, the first respondent testified and confirmed the fact that he admitted to PW2 (the investigating officer) that the accident happened due to his lost control of the defendant's vehicle. [see ROA pp. 88 to 89]

[89] This admission can also be seen in the amended defence at para. 16(b) as follows:

> (b) to record admission by the first defendant in that the collision was caused by his negligence in the driving of the vehicle SAB 4378 B to result in the injuries occurring to the first and second Plaintiffs;
>
> [see ROA page 14]

[90] In the course of his investigation, PW2 testified that a police summon no. D1577G001397 on 7 January 2019 had been issued to the first respondent under r. 10 of Road Traffic Rules 1959 (exh. P3). This fact is a relevant consideration to find a certain degree of liability against the first respondent (see *Teoh Weng You & Anor v. Tan Hee Joo* [2017] 8 CLJ 477).

[91] Thus, having perused the evidence and the appeal records and having admitting losing control of the vehicle Perodua Viva and running onto the first and second appellants, who were pedestrians standing at the roadside at the material times, 100% liability ought to be pronounced on the first respondent. The first respondent is solely liable for the occurrence of the accident. The second respondent being the registered owner of the Perodua Viva is therefore vicariously liable.

[92] As to the award on quantum, the learned SCJ had assessed the quantum figures for damages and injuries although she had dismissed the plaintiff's claim. Learned counsel for the appellants had submitted that the awarded quantum is within the suggested range recommendation by both counsels as reflected in the tables A and B prepared in the appellants' written submission (encl. 5). Hence the first and second appellants are entitled to sum awarded as shown in tables A and B which is reproduced below.

A

Table A: Comparison on the Quantum for the 1st Appellant

General Damages for the 1st Plaintiff (1st Appellant)		Submitted by		Awarded by
		Plaintiffs	Defendants	SCJ
(i)	Grade 1 Liver Injury	13,000.00	13,000.00	*13,000.00*
(ii)	(a) Cerebral Concussion	10,000.00	5,000.00	*5,000.00*
	(b) Loss of Consciousness and Retrograde Amnesia	-	5,000.00	*5,000.00*
(iii)	Multiple Facial Bone Fracture (Left Le Fort I Fracture)	35,000.00	20,000.00	*25,000.00*
(iv)	Left Eye Lateral Canthus Laceration	2,000.00	5,000.00	*2,000.00*
(v)	Left Medial Orbital Wall Fracture with Medial Rectus Entrapment (Left Zmc Fracture with Left Eye Orbital Blowout Fracture)	30,000.00	35,000.00	*30,000.00*
(vi)	Left Eye Commotion Retinae with Berlin's Oedema	15,000.00	10,000.00	*15,000.00*
	Total	105,000.00	-	-
	Deduction for Overlapping *[10% of Item (iii), (iv), (v), (vi)]*	(8,200.00)	-	-
	Payment received	(4,000.00)	-	-
	General Damages to be awarded [In Ringgit Malaysia (RM)]	92,800.00	93,000.00	*95,000.00*

B

C

D

Table B: Comparison on the Quantum for the 2nd Appellant

General Damages for the 2nd Plaintiff (2nd Appellant)		Submitted by		Awarded by
		Plaintiffs	Defendants	SCJ
(i)	Left traumatic diaphragmatic injury	20,000.00	35,000.00	*20,000.00*
(ii)	Closed fracture of the left clavicle	15,000.00	12,000.00	*12,000.00*
(iii)	Traumatic brain injury with small frontal contusional intra-cerebral haemorrhage	35,000.00	20,000.00	*25,000.00*
(iv)	Left 3rd - 7th rib fracture with 1st rib costo-chondral fracture	24,000.00	26,000.00	*24,000.00*
(v)	Left forehead laceration wound measuring 7cm in length	3,000.00	2,500.00	*3,000.00*
	Total	97,000.00	-	-
	Deduction for Overlapping *[10% of Item (i) and (iv); (iii) and (v)]*	(6,100.00)	-	-
	Payment received	(4,000.00)	-	-
	General Damages to be awarded [In Ringgit Malaysia (RM)]	86,900.00	95,500.00	*84,000.00*

E

F

G

Considering that the first and second appellants had received the sum of RM4,000 each from the first respondent, it should be deducted from the total award:

H

Quantum for first appellant (table A):

RM95,000 - RM4,000 = RM91,000

Quantum for second appellant (table B):

RM84,000 - RM4,000 = RM80,000

I

I so awarded.

Conclusion

[93] As to the preliminary objection raised by the respondents, it is my findings that the preliminary objection is devoid of merits. Learned counsel for appellants had indeed address the issue before the trial judge in submitting that the surat perjanjian damai dated 13 December 2018 (exh. P6) is void for uncertainty and hence there is no agreement as to settlement. (see pp. 289 to 292, ROA).

[94] Looking at the memorandum of appeal, grounds (b) and (e) address the issue in relation to 'accord and satisfaction'. The appellants are clearly pointing out the error allegedly made by the trial judge and providing sufficient notice to the respondents as to their main complaint that is the absence of accord and satisfaction. The focus of their submission is also pivoting on the aforementioned doctrine. Detailed perusal of these grounds would not suggest or imply any other defence. Further, the issue of 'accord and satisfaction' are the basis of the learned SCJ findings when she relied on the case of *Kerpa Singh v. Bariam Singh* (*supra*).

[95] For the reasons stated, the preliminary objection is hereby dismissed.

[96] As to the appeal proper, having considered the record of appeals and the submission by parties, it is in evidence that the appellants and the first respondent, who are the parties to surat perjanjian damai, are well aware that the payment of *sogit kampung* and *sogit mangsa* were meant to appease the family of the victims. Nowhere in the respondents' evidence that the respondents had been induced that the *sogit* payments and the initial cash payments of RM4,000 paid to each appellant was meant to be in satisfaction of the appellants' claim against the respondents.

[97] The finding made by the learned SCJ is against all the evidence of the witnesses, in particular, the testimony of the first respondent when he gave evidence that there was outstanding balance due to the appellants and the surat perjanjian damai had not been fully settled and completed. The learned SCJ had clearly misapplied the principles in *Kerpa Singh v. Bariam Singh.*

[98] Hence the finding by the learned SCJ that the "plaintiffs' were estopped from putting another claim against the defendants through the present suit as the payments of *sogit* and initial cash payments for medical expenses/treatments have been received and retained by the plaintiffs" lack of sufficient judicial appreciation of the evidence adduced in respect of the said perjanjian penerimaan wang (exhs. P7 and P17), thus amounting to a misdirection.

[99] I am of the considered opinion that this was a case in which appellate intervention was warranted. On the reasons above stated, my answer to issue (ii) whether there had been any accord and satisfaction in the present case, is in negative.

[100] It follows that the evidence adduced are crystal clear that having admitting losing control of the vehicle Perodua Viva and running onto the first and second appellants, who were pedestrians standing at the roadside at the material times, 100% liability ought to be pronounced on the first respondent. The first respondent is solely liable for the occurrence of the accident. The second respondent being the registered owner of the Perodua Viva is therefore vicariously liable. The appellants had therefore proved their claims against the respondents and entitled to the awarded quantum access by the learned SCJ which is within the suggested range recommendation by both counsels as reflected in the table A and B prepared in the appellants' written submission (encl. 5) with deduction of RM4,000 each of payment received and I so awarded.

[101] For the reasons aforesaid, the appellants appeal is therefore allowed with costs of RM5,000 subject to payment of allocator fee.